

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA and the
STATE OF NEVADA, ex rel CHERYLE
KERR,

Plaintiff,

vs.

APS HEALTHCARE, INC.,
INNOVATIVE RESOURCE GROUP,
LLC D/B/A/ APS HEALTHCARE
MIDWEST, and APS HEALTHCARE
BETHESDA, INC.,

Defendants.

Case No. 2:11-cv-01454-MMD-GWF

~~PROPOSED~~ AGREED
CONFIDENTIALITY AND
PROTECTIVE ORDER

By agreement of the parties, as evidenced by their respective undersigned counsel, the following Agreed Confidentiality and Protective Order (“Protective Order”) is entered with respect to all confidential information produced in the above-captioned action (the “Litigation”).

The following is hereby ORDERED:

1. This Protective Order shall apply to certain documents, or portions thereof, and the information contained therein, which any person or entity designates as “Confidential” or “Highly Confidential” (collectively referred to herein as “Protected Information”) in the manner described below.

2. Subject to the limitations set forth in this Protective Order, the producing party may designate as “Confidential” any type of information that the producing party, in good faith, believes contains confidential information.

1 3. The producing party may designate as “Highly Confidential” confidential
2 research, development, or commercial information which is so proprietary or competitively
3 sensitive that there is a reasonable likelihood that its disclosure might cause irreparable
4 competitive injury, including but not limited to business, financial, and marketing plans
5 having current or future applicability.

6 4. Protected Information shall also include “Protected Health Information”
7 (“PHI”) as defined by the Health Information Portability and Accountability Act
8 (“HIPAA”), 42 U.S.C. § 1320d, *et seq.* PHI shall be treated as confidential under the
9 terms of this Order and shall be marked “CONFIDENTIAL PROTECTED HEALTH
10 INFORMATION” or “CONFIDENTIAL PHI.” A document containing PHI shall be
11 produced unredacted. If a party encounters a document that has been produced that the
12 party reasonably believes contains PHI and has not been marked in accordance with this
13 paragraph, the party shall notify the party producing such documents so that appropriate
14 actions may be taken under the provisions of this Order. Pursuant to HIPAA, a covered
15 entity is permitted to disclose PHI in the course of a judicial proceeding if certain
16 “satisfactory assurances” are received. This Protective Order hereby provides the requisite
17 satisfactory assurances under HIPAA regarding documents and testimony. *See* 45 C.F.R. §
18 164.512(e)(1)(iv).

19 5. Documents or portions thereof may be designated “Confidential” or “Highly
20 Confidential” by the producing person or entity by:

21 (a) Marking “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” on
22 the face of the documents and on each successive page containing confidential
23 information;

24 (b) Indicating to undersigned counsel of record, in writing and with as
25 much specificity as is practicable, that a certain document or category of documents, or
26 any portion thereof, shall be deemed confidential or highly confidential; or

27 (c) Employing any other reasonable method agreed to by the parties.
28

1 In the event the producing party inadvertently fails to designate a document or
2 testimony as Protected Information, that producing party may make such a designation
3 subsequently by promptly notifying the other parties in writing. Until such notification,
4 however, disclosure of any such document or testimony shall not constitute a violation of
5 this Protective Order.

6 6. The protections conferred by this Protective Order cover not only Protected
7 Information, but also any information copied or extracted therefrom, as well as copies,
8 excerpts, summaries or compilations thereof, plus testimony, conversations or
9 presentations by parties in hearings or other settings that might reveal confidential
10 information or PHI.

11 7. To the extent that material stored or recorded in the form of electronic or
12 magnetic media (including information, databases or programs stored on computers, discs,
13 networks or tapes) (“Electronically Stored Data” or “ESI”) is produced by any person or
14 entity in such form, the producing person or entity may designate such material as
15 Protected Information, if the requirements of Paragraph 1 above are met, by cover letter
16 referring generally to such material or by marking “CONFIDENTIAL” or “HIGHLY
17 CONFIDENTIAL” on the media on which the Protected Information is produced.
18 Whenever any person to whom ESI designated as Protected Information is produced
19 reduces such material to hard-copy form, such person shall mark such hard-copy material
20 with the legend provided for in Paragraph 5 above.

21 8. Protected Information designated as “Confidential” shall only be used for
22 purposes of this Litigation and for no other purpose whatsoever except as otherwise
23 permitted by this Protective Order or required by law, and may be disclosed only to the
24 following persons:

25 (a) counsel of record and their respective employees and support
26 personnel;

27 (b) the receiving party, including any officers, directors, or employees
28 thereof assisting in the preparation for trial or appeal of this action;

1 (c) experts and consultants of the parties, and the employees of such
2 experts and consultants, retained or consulted by counsel of record for any party for the
3 sole purpose of assisting counsel in the Litigation;

4 (d) any person from whom noticed testimony is taken in this Litigation;

5 (e) employees of copying, imaging, translation and computer services for
6 copying, imaging, translating or organizing documents;

7 (f) the Court and court employees, court reporters and stenographers;

8 (g) any person indicated on the face of a document or accompanying
9 cover letter, email or other communication to be the author, addressee or a copy recipient
10 of the document, or, in the case of meeting or teleconference minutes, an attendee of the
11 meeting or participant in the teleconference; and

12 (h) any deponent in the course of a deposition in this Litigation.

13 9. Protected Information designated as “Highly Confidential” shall only be
14 used for purposes of this Litigation and for no other purpose whatsoever except as
15 otherwise permitted by this Protective Order or required by law, and may be disclosed only
16 to the following persons:

17 (a) counsel of record and their respective employees and support
18 personnel to whom it is necessary that the “Highly Confidential” information be shown for
19 purposes of this litigation;

20 (b) experts and consultants of the parties, and the employees of such
21 experts and consultants, retained or consulted by counsel of record for any party for the
22 sole purpose of assisting counsel in the Litigation;

23 (c) any person from whom noticed testimony is taken in this Litigation;

24 (d) employees of copying, imaging, translation and computer services for
25 copying, imaging, translating or organizing documents;

26 (e) the Court and court employees, court reporters and stenographers; and

27 (f) any person indicated on the face of a document or accompanying
28 cover letter, email or other communication to be the author, addressee or a copy recipient

1 of the document, or, in the case of meeting or teleconference minutes, an attendee of the
2 meeting or participant in the teleconference.

3 10. Protected Information shall not be disclosed to any person referred to in
4 Subparagraphs 8(c), 8(e), 8(h), 9(b), and 9(d) unless and until such person has read and
5 agreed to be bound by the terms and conditions of this Protective Order. Counsel shall
6 ensure that all personnel referred to in Subparagraphs 8(c), 8(e), 8(h), 9(b), and 9(d) are
7 familiar with this Protective Order and shall instruct such personnel that they are bound by
8 the terms thereof. The attached Exhibit A, Nondisclosure Agreement, shall be signed by
9 the above-referenced personnel before they are granted access to Protected Information. If
10 multiple personnel from a single company or firm are to be granted access to Protected
11 Information, the signature of one shall comply with this Protective Order and shall bind all
12 such personnel.

13 11. The persons governed by this Protective Order shall not disclose or
14 otherwise use the Protected Information or the information contained in the Protected
15 Information, except in connection with this Litigation and pursuant to the terms set forth
16 herein. Protected Information must be stored and maintained by a receiving party at a
17 location and in a secure manner that ensures that access is limited to persons authorized
18 under this Protective Order.

19 12. All persons governed by this Protective Order, by reviewing Protected
20 Information, shall agree to the jurisdiction of this Court over their person for the purpose
21 of any action seeking to enforce the terms and conditions of this Protective Order, or for
22 any action for contempt for violation of the terms of this Protective Order.

23 13. Any nonparty from whom discovery is sought must be informed of, and may
24 obtain the protection of, this Protective Order. The party seeking discovery must give a
25 copy of this Protective Order to non-parties from whom discovery is sought. The nonparty
26 may invoke the terms of this Protective Order by so advising the parties to the Litigation in
27 writing or by asserting such protections on the record during any deposition or similar
28 proceeding. Any such nonparty shall have standing to appear in the Litigation in order to

1 file motions and oppose motions, as necessary, to protect such nonparty's rights in its
2 information.

3 14. A party may designate as Protected Information any information contained in
4 documents that are in the possession of a nonparty, from whom discovery is sought, if that
5 party believes, in good faith, that the documents contain the party's confidential
6 information.

7 15. The procedures for use of Protected Information during any hearing or the
8 trial of this matter shall be determined by the parties and the Court in advance of the
9 hearing or trial. The parties shall consider redacting confidential documents to remove
10 identifiable patient identifiers or other confidential information, request the Court to
11 submit such documents under seal, code the documents to substitute a numerical or other
12 designation for the patient's name or other confidential information, request that any
13 exhibit be placed under seal, introduce summary evidence where practicable which may be
14 more easily redacted, and assure that all Social Security and Medicaid identification
15 numbers associated with the names of individual patients or other individuals have been
16 removed. No party shall disclose PHI in open Court without consent of the Court.

17 16. Any party may designate the portion of a deposition transcript (including
18 exhibits) that contains Protected Information with a statement to such effect on the record
19 in the course of the deposition. The party may so advise the reporter. In addition, counsel
20 for a party shall be permitted in good faith to designate those portions of the transcript and
21 exhibits containing Protected Information as confidential within thirty (30) days of receipt
22 of the transcript of such deposition. Until such time, all parties shall treat the deposition as
23 Protected Information.

24 17. If any party to the Litigation disputes the designation of any document,
25 information or deposition transcript as Protected Information, the parties shall attempt to
26 resolve by agreement the question whether or on what terms the document is entitled to
27 confidential or highly confidential treatment. If the parties are unable to agree as to
28 whether the document or deposition transcript is properly designated as Protected

1 Information, counsel for the party objecting to the designation may file an appropriate
2 motion with the Court, seeking an order determining that the person or entity seeking
3 confidentiality is not entitled to treat the document or deposition transcript as confidential
4 or highly confidential. The burden rests upon the person or entity seeking confidentiality
5 to demonstrate that such designation is proper. Until a final resolution of the dispute is
6 achieved either through consent or court order, all parties shall treat the designated
7 documents or deposition transcripts as Protected Information.

8 18. Nothing in this Protective Order shall prevent any person or entity from
9 using or disclosing its own documents or information.

10 19. A person's compliance with the terms of this Protective Order shall not
11 operate as an admission that any particular document is or is not (a) confidential or highly
12 confidential, (b) privileged or (c) admissible in evidence at trial.

13 20. This Protective Order shall survive the termination of the Litigation and shall
14 continue in full force and effect thereafter. Except as otherwise provided herein, Protected
15 Information, including any information copied or extracted therefrom, as well as copies,
16 excerpts, summaries or compilations thereof, plus testimony, conversations or
17 presentations by parties in hearings or other settings that might reveal confidential
18 information or PHI, shall be returned to the producing person or entity or destroyed within
19 sixty (60) days of the conclusion of the Litigation, whether by settlement, judgment or
20 otherwise. Except as otherwise provided herein, each person or entity shall provide the
21 producing person or entity, within sixty (60) business days of the conclusion of the
22 Litigation, a declaration certifying that all documents required to be returned or destroyed
23 pursuant to the provisions of this paragraph have been returned or destroyed.
24 Notwithstanding the above provisions, counsel of record shall be permitted to keep one
25 copy of all deposition transcripts, court filings, and attorney generated documents referring
26 to Protected Information for archival purposes, provided that such documents are viewed
27 only by the attorneys and not by the parties themselves or any other individual and treated
28 as confidential in accordance with this Protective Order.

1 21. Any person in possession of Protected Information who receives a subpoena
2 (or other process) from any person or entity that is not a party to this Protective Order
3 seeking production or other disclosure of such Protected Information shall promptly give
4 telephonic notice and written notice by overnight delivery, hand delivery and/or facsimile
5 to counsel for the person or entity who produced and/or designated the materials as
6 confidential identifying the materials sought and enclosing a copy of the subpoena or other
7 process. Such notice shall be given at least ten (10) business days before any production
8 or other disclosure. The party receiving the subpoena (or other process) shall object to the
9 production on the basis of this Protective Order and shall make a good faith effort to afford
10 the producing party or nonparty an opportunity to be heard by the person or entity issuing
11 the subpoena (or other process). The party receiving the subpoena (or other process) shall
12 not produce any Protected Information in its possession unless ordered by a Court.
13 Notwithstanding the above provision, nothing herein shall require any party receiving a
14 subpoena to disobey any Court Order or to file any motion opposing the subpoena.

15 22. This Protective Order may be modified or amended by order of the Court for
16 good cause shown or by agreement of the parties.

17 23. Nothing in this Protective Order shall preclude the parties from entering a
18 subsequent protective order with regard to documents to be filed with the Court under seal.

19 24. The inadvertent production of any privileged or otherwise protected
20 materials shall not be deemed a waiver or impairment of any claim of privilege or
21 protection, including, but not limited to, the attorney-client privilege and the protection
22 afforded to work-product materials, or the subject matter thereof. Upon receiving notice
23 from the producing person or entity that such materials, including copies or summaries
24 thereof, have been produced, all such materials and any copies thereof shall be returned to
25 the producing person or entity within five (5) business days of receipt of such notice, and
26 any notes made therefrom shall be destroyed. Just as a party has the right to designate
27 materials as Confidential or Highly Confidential in accordance with paragraph 5, a party
28 shall have the right to designate materials as subject to a claim of privilege or protection

1 should another party or entity produce documents subject to the designating party's
2 privilege or protection.

3 25. The production of any documents without the confidentiality legend which
4 should have been so designated shall not be deemed a waiver of the right to designate such
5 materials as Confidential or Highly Confidential in accordance with paragraph 5.

6 26. In the event that any person or party subject to this Protective Order violates
7 or threatens to violate any term or condition herein, the party whose interests in
8 confidentiality are at risk may immediately apply to the Court to obtain injunctive relief.
9 In any such proceeding, no person or entity subject to this Protective Order shall assert as a
10 defense that the other party possesses an adequate remedy in equity or at law.

11 IT IS SO ORDERED.

12 ENTERED this 13th day of May, 2013.

13
14 
15 UNITED STATES MAGISTRATE JUDGE

16 APPROVED FOR ENTRY:

17 LEWIS AND ROCA, LLP

18 /s/ Ann-Martha Andrews
19 Ann-Martha Andrews, Esq..
20 3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

21 Richard L. Shackelford
22 (admitted *pro hac vice*)
23 James W. Boswell, Esq.
24 (admitted *pro hac vice*)
25 KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309-3521

26 *Attorneys for Defendant APS Healthcare Inc.,*
27 *Innovative Resource Group, LLC D/B/A APS Healthcare*
28 *Midwest, and APS Healthcare Bethesda, Inc.*

1 ASHCRAFT & GEREL, LLP

2
3 /s/ Jamie M. Bennett

4 Jamie M. Bennett
(admitted *Pro Hac Vice*)

5 Nathan M. Peak
(admitted *Pro Hac Vice*)

6 4301 Garden City Drive

7 Suite 301

8 Landover, MD 20785

9 Key Reid, Esq.

10 THE REID FIRM, LLC

2370 Corporate Circle Drive,

11 3rd Floor

Henderson, Nevada 89074

12 *Attorneys for Plaintiff-Relator Cheryle Kerr*

EXHIBIT A

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DISTRICT OF NEVADA

UNITED STATES OF AMERICA and the
STATE OF NEVADA, ex rel CHERYLE
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Plaintiff,

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APS HEALTHCARE, INC.,
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MIDWEST, and APS HEALTHCARE
BETHESDA, INC.,

Defendants.

I hereby certify that I have read and am familiar with the terms and conditions contained in the Protective Order entered by the Court on the ____ day of _____, 2013, in the above-captioned case, and agree to be bound by the terms and conditions thereof.

Name (print or type)

Company (if not a party)

Position/Title (if not a party)

Business Address (if not a party)

Date

Signature